Supreme Court, U.S.
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No. 93-1263

In The

Supreme Court of the United States

October Term, 1993

ERROL BERNARD,

Petitioner,

vs.

HARRY CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, INDIVIDUALLY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Fifth Circuit

RESPONSE TO PETITIONER'S APPLICATION

WESSEL, BARTELS & CIACCIO
Law Corporation

VICTORIA LENNOX BARTELS*
WILLIAM F. WESSEL
127 Camp Street
New Orleans, La. 70130
(504) 568-1112
*Counsel of Record

Attorneys for Respondent, Harry F. Connick

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Was the right of a plaintiff to assert claims of deprivation of civil rights against a district attorney or other public official on the basis of allegations of said defendant's failure to train and/or supervise his employees sufficiently articulated prior to 1975 to justify denial of District Attorney Harry Connick's defense of qualified immunity in these proceedings, where sued in his individual capacity under 42 U.S.C. § 1983 based upon such an allegation?

II. Whether a lesser standard for **indirect** liability under 42 U.S.C. § 1983 should be applied in claims against public officials in their individual capacities than is now applied against public officials in their official capacities?

III. Whether review of summary judgment would be appropriate in this case, even assuming a conflict among the Circuit Courts regarding the appropriate standard to be utilized for imposition of personal liability for indirect involvement in civil rights violations, where plaintiff's evidence (or total lack thereof) would fail to meet any of the various standards for imposition of liability utilized by any Circuit Court?

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STATEMENT OF THE CASE

Respondent/defendant, Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana, does not agree with Mr. Bernard's version of the events leading up to his criminal prosecution on the charge of murder by the Orleans Parish District Attorney's office. What has been established and is beyond dispute is that on April 18, 1975, plaintiff Errol Bernard shot and killed Vernon Joseph on Third Street in new Orleans, Louisiana and walked or ran away from Joseph's bleeding body. Within minutes of the shooting, uniformed officers Mike Marziale and Eddie Watson arrived at the scene. Several witnesses were able to give the officers a description of Bernard. Three of the witnesses were placed in the rear of the police vehicle and driven around the vicinity. All three of the witnesses identified Bernard, walking along the street in the 2700 block of Clara Street. Mr. Bernard was arrested.

A weapon, which later proved to be the weapon from which the fatal bullet was shot, was removed from Mr. Bernard's person at the time of his arrest. Following the reading of his rights, Mr. Bernard made to the arresting officers an admission that he had in fact done the shooting and wished to make a statement. The initial police report reflects that in this statement made later that day to Dets. Joseph Miceli and Robert Cutrer, homicide detectives to whom the case was assigned, Mr. Bernard claimed that he had been attacked by Mr. Joseph and knocked to the ground. That he had pulled a revolver from the rear of his waistband and shot Joseph. Bernard could give no reason why Joseph would attack him, since he stated he had never seen Joseph before. In addition, a

written question and answer statement was taken from Mr. Bernard and was signed by him.

Witnesses from the scene also gave statements to the police. The initial police report reflects that the detectives interviewed Theodore Hunter (one of the three witnesses who made the initial identification of Mr. Bernard). The report attributes the following paraphrased statement to Mr. Hunter;

> "Hunter stated that he was walking on Third Street and met the victim of the shooting who he did not know by name. Hunter stated that he then began to walk on Third St., with the subject having a conversation with him. Upon reaching the intersection of Freret St. he then crossed over to the other side of the street. As he turned he observed that the man he was walking with was engaged in a fist fight with another man who was walking on the street at this time. Hunter stated that he then heard a gun shot and observed the man he was walking with fall to the ground."

It could be argued that this paraphrased version of Mr. Hunter's statement is not relevant given the existence of a written question and answer statement taken from Hunter and signed by him in which he stated he had heard a shot and turned around. In response to a subsequent question, he said that he turned and saw "a scuffle" during the course of which the victim was pushed to the ground and shot. Mr. Hunter gave no indication that he had seen who had been the aggressor in this encounter, or that he had observed any other detail which might be relevant to Mr. Bernard's asserted defense.

On May 1, 1975, the Grand Jury for the Parish of Orleans returned a true bill against Mr. Bernard, charging him with second degree murder of Vernon Joseph. An Application for a Bill of Particulars was filed on behalf of Mr. Bernard, asking among other things, "(d)oes the District Attorney's office have knowledge of any statements, evidence, or any information of any nature that might be considered exculpatory in nature?" A Bill of Particulars was prepared by defendant Bridge Bane and signed by defendant Davis Jennings, both acting in their respective capacities as Assistant District Attorneys in and for the Parish of Orleans, State of Louisiana. In answer to Interrogatory No. 11 described above, the Bill of Particulars stated that "(t)he State has no such knowledge other than defendant's statements."

On January 5 and 6, 1976, the charge against Errol Bernard was tried by ADAs Julien and Lenfant to a jury which returned a verdict of guilty as charged. Mr. Hunter and the two others witnesses who identified Mr. Bernard at the trial, all testified that they had not seen the events which led up to the shooting. Mr. Bernard testified and presented his version of the events. Following his conviction, Mr. Bernard was sentenced to life imprisonment.

In November of 1988, an application for post conviction relief was filed on behalf of Mr. Bernard on the basis of information contained in the initial police report, a copy of which it is alleged that Mr. Bernard first received on November 8, 1988. Mr. Bernard asserted that the police report contained certain "exculpatory" information to which he had been entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition,

to the statement of Theodore Hunter, set forth hereinabove, there were references to the criminal record of the victim and to statements ascribed to the victim's sister that her brother had confided in her fears that his life was in danger "because he felt that certain people in the penitentiary wanted to kill him." Mr. Joseph had made these statements to her on the day he had been released from Angola, the day before his death. Mr. Bernard claimed that these matters should also have been disclosed to him in connection with his request for "exculpatory" evidence.

On October 27, 1989, Hon. Patrick Quinlan of the Criminal District Court for the Parish of Orleans, acting upon Mr. Bernard's Application for Post Conviction Relief, vacated the sentence imposed upon Mr. Bernard and ordered that he be afforded a new trial. On December 15, 1989, Mr. Bernard entered an Alford plea of guilty to the amended charge of manslaughter. A sentence of twenty-one (21) years was imposed, with credit for time served. Mr. Bernard has since been released.

On November 9, 1989, these proceedings were instituted by plaintiff Errol Bernard against District Attorney Harry Connick, former Assistant District Attorneys Bridget Bane, John Lenfant, IV, and Henry P. Julien, Jr., as well as certain of the police officers involved in his arrest, under 42 U.S.C. 1983 for alleged violation of his civil rights.[1] This suit was subsequently amended to add as a party defendant former Assistant District Attorney David

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[1] Mr. Bernard later voluntarily dismissed all claims against the police officers.

Jennings. The District Attorney and each of his former assistants were sued in both their individual and official capacities.

Mr. Bernard did not seek review by this Court of the decision rendered in connection with an earlier appeal to the U.S. Fifth Circuit, affirming the decision of the district court which dismissed by way of summary judgment plaintiff's suit against defendants Bane, Lenfant, Julien, and Jennings, in all capacities, as well as plaintiff's suit against defendant Harry F. Connick, in his official capacity. These judgments are now final, and the issues now presented to this Court are confined solely to those raised by plaintiff's suit brought against Mr. Connick in his personal capacity for "failure to train" his assistant district attorneys.[2]

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[2] The Fifth Circuit in its earlier action remanded the suit against Mr. Connick in his individual capacity since it had been dismissed under 12(b)(6) on the grounds of absolute immunity. This was adjudged inappropriate absent a determination regarding whether Mr. Connick under the circumstances alleged by plaintiff was entitled to absolute or qualified immunity. This remand was ordered reluctantly, for as the panel of the Court noted "(i)t is likely that this question is amendable to summary judgment based on the record developed for the official capacity suit."

REASONS FOR DENYING THE WRIT

I. In determining whether or not a defense of qualified immunity is to be afforded to a public official on a claim brought against him in his individual capacity, it is the conduct of the defendant public official which must be examined. In this case, where Mr. Connick is sued for alleged failure to train and/or supervise his assistants, the focus of the Court should be upon whether the rights of a plaintiff to recover damages under 42 U.S.C. § 1983 upon allegations of failure to train and/or supervise was sufficiently articulated at the time of the alleged conduct to deprive defendant of a qualified immunity defense. The exact status of the rights secured to criminal defendants under *Brady v. Maryland* is not germane to this determination, where there is no allegation that Mr. Connick participated in or was even aware of any decision to withhold exculpatory evidence from Mr. Bernard.

Mr. Bernard alleges that Mr. Connick failed to adequately train assistant district attorneys to recognize and produce material to criminal defendants as required under the *Brady* rule and/or adequately supervise them in the performance of this duty. Plaintiff's analysis regarding the defense of qualified immunity asserted by Mr. Connick in this matter is limited to an examination of the status of *Brady* and its progeny in 1975 and 1976, when the events of which plaintiff complains took place. This focus is incorrect.[3] Mr. Connick cannot be held liable

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[3] Although the opinion of the district court was based upon its opinion that in 1975 "the *Brady* doctrine was not yet fully developed", Opinion of the district court, appearing at Plaintiff's Petition for Writ of Certiorari, at p. 29A, it was clear at the

on the basis that exculpatory material within the meaning of the *Brady* rule was withheld from plaintiff at the time of his criminal prosecution. Mr. Connick took no part in the analysis in 1976 of the information in the possession of the Office of the District Attorney regarding Mr. Bernard's shooting of Vernon Joseph. He took no part in the decision regarding what information Mr. Bernard was entitled to under the *Brady* rule, and he took no part in the decision not to produce other material. He did not know what, if any, information had been withheld or for what reason. In fact, plaintiff does not dispute the fact that Mr. Connick played no personal role whatsoever in the prosecution of Mr. Bernard for murder.

It has for many years been clear that responsibility under 42 U.S.C. § 1983 must be based on fault directly attributable to the defendant and may not rest solely on a theory of imputed liability. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978). In *Monell*, this Court specifically rejected the contention that the liability of any public entity could be founded solely on a theory of *respondeat superior.* The same is true when the public employer is sued in his individual capacity based upon the acts of his employees.

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oral argument before the U.S. Fifth Circuit, that the circuit court was not misled by plaintiff's focus on the status of *Brady* law. In response to the pointed question of whether or not he could cite any case decided in 1975 or earlier, imposing liability under 42 U.S.C. § 1983 on the basis of failure to train and/or supervise, Mr. Bizal, as counsel for Petitioner, was forced to respond that he knew of no such case.

The proper focus for analysis of Mr. Connick's defense of qualified immunity is whether or not Mr. Connick could reasonably have foreseen, given the status of the law in 1975 and 1976, that failure to train assistant district attorneys could form the basis of a compensable claim for damages under 42 U.S.C. § 1983.

The standard by which an official's entitlement to qualified immunity is measured is an objective one. A public official is immune to suit under 42 U.S.C. § 1983 if his action did not violate constitutional laws and/or principles clearly established at the time. *Mitchell v. Forsyth,* 105 S.Ct. 2806, 2817 (1985); *Harlow v. Fitzgerald,* 102 S.Ct. 2727 (1982); *Wood v. Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975); and *Procunier v. Navarette,* 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978)).

> "The law is deemed to be clearly established if the contours of a right asserted as sufficiently clear that a reasonable official would understand that **what he is doing** violates that right. [*Texas Facility Ass'n v. University of Texas at Dallas,* 946 F.2d 379 (5th Cir. 1991)] at 389-90 . . . 'The contours of the right must be sufficiently clear that a reasonable official would understand that **what he is doing** violates the right.' [*Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987)]" (Emphasis added.)

White v. Taylor, 959 F.2d 539, 544 (5th Cir., 1992). Since Mr. Connick did not himself "do" anything with respect to the prosecution of Errol Bernard and did not himself withhold *Brady* material from Mr. Bernard, the exact state of the law regarding *Brady* in 1976 is irrelevant for this

determination. In order to determine if Mr. Connick could have known that what he himself was "doing" (or not doing) violated clearly established principles of constitutional law, we must examine instead status of the law regarding claims alleging "failure to train".

This Court first considered an allegation of "failure to train" in the context of litigation under 42 U.S.C. § 1983 in *City of Oklahoma City v. Tuttle* 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). The question of whether or not a policy not itself unconstitutional, such as inadequate training, could be the basis of liability under § 1983 was not decided therein. The Court indicated, however, that in order for such a policy to ever result in liability, there would have to be strong proof that the policy itself caused the deprivation of rights suffered by plaintiff.

It was not until 1989 that the U.S. Supreme Court dealt again with this issue and stated that an allegation of insufficient or improper training can in fact be sufficient to state a cause of action and delineated in *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the circumstances under which such a claim would be appropriate. This case was decided more than a decade after the criminal prosecution of plaintiff Bernard out of which this action arose.

In 1975 and 1976, a "reasonable" district attorney would have had no reason to suspect, much less to know, that his failure to train employees could under any circumstances result in an actionable deprivation of civil rights of a criminal defendant. The judgment dismissing plaintiff's suit against Mr. Connick in his individual capacity on the grounds of qualified immunity is therefore correct. Review by this Court is unnecessary.

II. The standard for imposition of vicarious liability under 42 U.S.C. § 1983 for indirect participation in a civil rights violation has been articulated by this Court as requiring "deliberate or conscious indifference" to the deprivation of civil rights naturally resulting from the defendant's own conduct. There is no rational reason for imposing liability on a public official, when sued in his individual capacity upon the basis of actions of his employees which allegedly resulted in constitutional violations, on a lesser standard than is applied to municipal liability for the actions of municipal employees.

It is clear that there are important distinctions between "individual capacity" and "official capacity" claims under 42 U.S.C. § 1983. By their very nature, "official capacity" claims seek to impose liability upon a public entity for the actions of its employees. "Individual capacity" claims ordinarily seek to impose liability upon the individual defendant for his own actions. The distinctions between these two categories of claims begin to blur when the "individual capacity" claim is one for imposition of liability upon the defendant public official for the conduct of his employees/assistants. All of this Court's reasoning in *Monell, supra,* applies with at least equal force to this claim against Mr. Connick for alleged deprivations by Mr. Connick's assistants of Mr. Bernard's civil rights.

The Petitioner's argument that various of the Circuits have applied to individual capacity suits a standard substantively different from the "conscious or deliberate indifference" standard enunciated in *City of Canton v. Harris, supra,* for imposition of liability for supervisory

conduct is unconvincing. Any distinction is difficult to draw between "conscious or deliberate indifference" and "deliberate or reckless disregard", the standard attributed by Petitioner to the Seventh Circuit, Petitioner's Application for Writ, at p. 19, or "implicitly authoriz(ing), approv(ing), or knowingly acquiesc(ing) in the unconstitutional conduct", the standard attributed to the Sixth Circuit, *Id.* The "causal connection" standard, attributed by Petitioner to both the Second and the Ninth Circuits, *Id.* pp. 19 - 20, can be directly traced to this Court's discussion of "the affirmative link" required between the defendant's conduct and the constitutional deprivation in *Canton.* It is not at all clear that any Circuit has applied a less restrictive standard for imposition of supervisory liability under 42 U.S.C. § 1983 than that required under *Canton.*[4]

In truth, there can be no reasonable basis for imposing liability upon public officials in their individual capacities for the actions of their employees on a lesser standard than is applied to municipalities for the actions of their employees. In fact, an argument can and should be made that the same public policy concerns which result in affording absolute and/or quasi immunity to public officials to personal liability under § 1983, require

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[4] Any conflict between the decision of the U.S. Fifth Circuit in this case and that of the U.S. Second Circuit in *Walker v. City of New York,* 974 F.2d 293 (2 Cir. 1992) is not properly before this Court under Petitioner's own analysis. The *Walker* case is an official capacity case **not** an individual capacity case.

that plaintiffs meet an equal or even higher standard for imposition of liability upon officials sued in their personal capacities for deprivation of civil rights in which they had no direct involvement, participation, or knowledge.

Will we be able to expect our public officials to confidently and vigorously perform their duties, particularly in this age of shrinking public budgets with the resulting rationing of available resources to accomplish the equally compelling goals of performing their public functions and training subordinates to assist them in that performance of their duties, with the spectre of personal liability, not only for their own conduct, but for the conduct of others, hanging over their heads? Will we permit civil plaintiffs to second guess the choices we have forced these public servants to make regarding the manner in which they will spend public funds and impose personal liability on a standard less restrictive than "deliberate indifference"? Such a course can have no practical or legal justification. The application of a standard of "deliberate indifference" to plaintiff's claims against Mr. Connick in his personal capacity is therefore appropriate, and this Court need not review this decision.

III. Review of plaintiff's claims by this Court is inappropriate where the plaintiff's evidence asserted in opposition to summary judgment was legally insufficient to forestall judgment under any standard which could be applied consistent with this Court's admonitions that liability cannot be imposed under 42 U.S.C. § 1983 on the basis of respondeat superior or on the basis of mere negligence.

In this case, appellant's allegation of "inadequate training" sufficient to impose personal liability upon Mr.

Connick is absurd, regardless of the standard applied. Each of the Defendants who actually participated in the criminal prosecution of Errol Bernard was a graduate lawyer. Each received three years of specialized training in the analysis of opinions of courts of law and in the application of the principles enunciated therein to the facts at hand. Each passed the examination for admission to practice law in the state of Louisiana.

These facts imply intensive training in the skill of reading and interpreting case law and applying the principles enunciated therein to different sets of facts. Coupled with the stated policy of the Orleans Parish District Attorney's Office, as well as its customary practice, that defendants be provided with all material to which they are entitled under *Brady* and that, in cases in which the determination is unclear, the material should either be provided to the defendant or the question referred to the judge for his resolution, the decision that further training in the application of *Brady* and its progeny to various factual situations was and is unnecessary can hardly be said to exhibit a "deliberate indifference" to the rights of criminal defendants. Nor could such a decision be said to be in "deliberate and reckless disregard of plaintiff's rights", the standard attributed by petitioner to the Seventh Circuit, as set forth in *Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985). Nor could reliance upon the legal training received in law school be considered "gross negligence", as petitioner interprets the standard in the Second Circuit. See Petitioner's Application at pp. 19 - 20. Reliance upon the training described above as adequate to discharge competently the obligations of an assistant district attorney is more than reasonable.

Furthermore, the record is replete with evidence which shows that there was in fact a program of training and supervision of Orleans Parish assistant district attorneys. Petitioner has simply chosen to ignore the uncontroverted evidence in the record to the effect that compliance with the *Brady* rule was an important concern to the office. Both former assistants Bane and Jennings testified at deposition that the office had compulsory training sessions conducted on Saturdays that covered all issues of prosecution, including the obligations of the prosecutor to provide to criminal defendants exculpatory materials under *Brady v. Maryland*.

Not only did Petitioner fail to offer any countervailing evidence, but Petitioner has never even suggested what sort of training program or supervision would be appropriate and sufficient to insure that no mistakes and/or differences of opinion regarding the identification of exculpatory evidence would occur. The training program chosen by the defendant District Attorney cannot be said to have "caused" plaintiff to suffer a deprivation of his rights if there exists no alternative program which would have insured that such an event did not occur. Since petitioner concedes that "a causal connection" between the defendant's conduct and the resulting deprivation of constitutionally secured rights is at least the minimum standard required by any Circuit Court (Petitioner's Application at pp. 19 - 22), the evidence proffered by petitioner in opposition to defendant's motion for summary judgment was insufficient to withstand judgment under any standard. Summary judgment, dismissing petitioner's complaint against Mr. Connick, in his

individual capacity, was completely appropriate in these proceedings.

CONCLUSION

This is not "one more example of the Fifth Circuit's apparent hostility toward § 1983 actions", as petitioner would cavalierly categorize it. It is quite simply an instance in which the petitioner has no claim against Mr. Connick. Notwithstanding the fact that qualified immunity affords Mr. Connick a defense to this suit justifying dismissal prior to discovery, Mr. Bernard was given two opportunities to conduct depositions and develop evidence to support a claim. He failed to do so. The lower court's decision to dismiss on the alternative grounds of qualified immunity and/or summary judgment was therefore eminently fair and absolutely correct. Petitioner's Application for Writ of Certiorari should be denied.

Respectfully submitted,

WESSEL, BARTELS & CIACCIO,
Law Corporation

VICTORIA LENNOX BARTELS*
WILLIAM F. WESSEL
Counsel of Record*

Attorneys for Respondent
Harry F. Connick